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379-454—70——1

CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 628

DANIEL JAY SCHACHT, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (A. 57–71) is reported at 414 F. 2d 630.

JURISDICTION

The judgment of the court of appeals was entered on May 14, 1969. A motion for leave to file a petition for a writ of certiorari out of time and the petition for a writ of certiorari were filed on September 22, 1969, and were granted on December 15, 1969 (A. 72; 396 U.S. 984). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). We discuss *infra,* pp. 9–21, a question as to the jurisdiction of the Court to entertain the untimely petition in this case.

QUESTIONS PRESENTED

1. Whether the Court has jurisdiction in this case notwithstanding the untimeliness of the petition.

2. Whether Congress, under a statute of general applicability, may constitutionally prohibit the wearing by civilians of distinctive parts of the uniform of the armed services in the circumstances of this case.

3. Whether the wearing of the uniform in a street protest demonstration, as part of which a brief skit was performed, was within the statutory exemption provided in 10 U.S.C. 772(f) for an actor portraying a member of the Army in a theatrical or motion-picture production.

STATUTES INVOLVED

18 U.S.C. 702 provides:

> Uniform of armed forces and Public Health Service.
>
> Whoever, in any place within the jurisdiction of the United States or in the Canal Zone, without authority, wears the uniform or a distinctive part thereof or anything similar to a distinctive part of the uniform of any of the armed forces of the United States, Public Health Service or any auxiliary of such, shall be fined not more than $250 or imprisoned not more than six months, or both.

10 U.S.C. 772 provides in pertinent part:

> When wearing by persons not on active duty authorized.
>
> * * * * * * *
>
> (f) While portraying a member of the Army, Navy, Air Force, or Marine Corps, an actor in a theatrical or motion-picture production may

wear the uniform of that armed force if the portrayal does not tend to discredit that armed force.[1]

STATEMENT

After a jury trial in the United States District Court for the Southern District of Texas, petitioner and Jarrett Vandon Smith, Jr., were convicted of the unauthorized wearing of distinctive parts of an Armed Forces uniform, in violation of 18 U.S.C. 702. On February 29, 1968, petitioner was sentenced to imprisonment for six months and fined $250. The court of appeals affirmed both convictions.[2]

On December 4, 1967, approximately nineteen persons gathered outside the Armed Forces Induction Center at Houston, Texas, to protest American participation in the Vietnam war. Some of the demonstrators marched up and down with anti-war placards; others passed out leaflets (A. 19–20, 30). During the course of this demonstration, which lasted from 6:30 to 8:30 a.m., petitioner and co-defendant Smith were observed wearing distinctive parts of the uniform of the United States Army (A. 12–15). Petitioner wore a blouse of the type currently authorized and issued to Army enlisted men, bearing a shoulder patch designating service in Europe. The buttons on his blouse were of a distinctive military design. On his head petitioner wore an outmoded military hat. Affixed to the hat in an inverted position was the eagle insignia currently worn on the hats of Army officers

[1] See 14 U.S.C. 486 making this exception applicable to Coast Guard uniforms.

[2] Smith did not file a petition for a writ of certiorari.

(A. 20–23, 26–28). Smith was wearing an Army blouse with official military buttons attached (A. 13–15; R. 102–103). Neither petitioner nor Smith were members of the Armed Forces at the time they wore these items.[3]

During the demonstration Smith distributed leaflets while petitioner and another individual dressed in military-colored coveralls pursued a third person dressed as a woman in a black robe and a coolie-type hat. The pursuers carried water pistols filled with red ink. One would say "Be an able American" and they would shoot their water pistols at the third person, who would fall to the pavement. They would then kick the cape aside and say "My God, this is a pregnant woman" (A. 30). A newspaper reporter covering the demonstration testified that the skit was performed three or four times, each performance lasting no longer than three minutes (A. 32).[4] Government witnesses who had seen petitioner at the demonstration declined to characterize his conduct as a role in a play; they testified that in the course of the demonstration petitioner and the other individuals merely chased each other in a manner resembling horseplay rather than acting (A. 16, 18, 24).

The individual who was dressed as the black robed woman testified that he was portraying a Viet Cong in order to show some of the "more inhuman as-

[3] Petitioner had never been in the military service; Smith had been honorably discharged from the United States Army (R. 193).

[4] The jury was shown a movie of the skit (R. 350–353).

pect" that American soldiers carry toward the Vietnamese and that it was his purpose to discredit the actions of the Army (A. 34, 37–38). He said that part of the skit was "rehearsed" the day before in front of a student club at the University of Houston in order to get student opinion (A. 34–35, 37). Testifying in his own defense, petitioner explained that he wore parts of the military uniform to express his beliefs about Vietnam (A. 42) and that the skit was part of a nationally coordinated demonstration (A. 40).

The trial court instructed the jury as to the various statutes and regulations which authorized a person to wear a military uniform (A. 47). The court told the jury that petitioner claimed that he was authorized to wear the uniform under the exception provided in 10 U.S.C. 772(f). It read the language of this provision and defined the words "portrayal," "theatrical," and "discredit" (A. 50–53). The jury was told that it must acquit petitioner if it found that he wore parts of the military uniform while performing in a theatrical production if he did so in a manner which did not tend to discredit the Armed Forces (A. 53–55).

ARGUMENT

Summary and Introduction

I

We discuss in Part I, *infra,* a substantial question as to the jurisdiction of this Court to entertain the petition for a writ of certiorari in this case, which

was filed 101 days after the time specified in Rule 22(2) of the Court's Rules had expired. The Court has consistently held that time limitations prescribed by statute are jurisdictional and that an untimely application, in a case governed by statute, does not confer jurisdiction on the Court. Although the Court has indicated that it does not regard the time limits specified by its Rules as having jurisdictional effect, that position is inconsistent with clearly articulated congressional policy and raises a constitutional problem.

The statutory authority under which the Court promulgated Rule 22(2) was enacted by Congress to enable the Court to *expedite* the disposition of criminal cases. There is no indication that Congress intended to authorize the Court to disregard the 30-day rule which the Court adopted to fix the time for invoking its jurisdiction, and it plainly distorts the intent of Congress to entertain petitions, like the one here, filed after the expiration of the maximum time which Congress has authorized for petitioning in *any* type of case. In addition, the importance of strict adherence to time limitations in effectuating the policy of finality of litigation, particularly significant in criminal cases, refutes the suggestion that Rule 22(2) may be disregarded merely because it is a rule and not a statute, and supports our submission that the Rule specifies a jurisdictional limitation which was not satisfied in this case.

II

There is sharp disagreement between petitioner and the government as to how the issues in this case

should be framed and considered. The petitioner was prosecuted under a statute, 18 U.S.C. 702, which states a general prohibition against the wearing "in any place" of the "uniform or a distinctive part thereof" of any of the armed forces without authority to do so. It was proved at trial that petitioner, a civilian, did wear distinctive parts of the uniform of the United States Army. He claimed, however, that his use of the uniform was exempted from the reach of 18 U.S.C. 702 under another statute, 10 U.S.C. 772(f), which permits "an actor in a theatrical or motion-picture production" to wear the uniform while portraying a member of one of the armed services "if the portrayal does not tend to discredit" the service. This statutory defense, together with its limitation, was submitted to the jury by the trial court, and the petitioner was convicted. By a process of reasoning which does not seem to have been fully articulated in his brief, petitioner concludes that he was convicted of performing in a skit which tended to discredit the Army and that such a conviction violates his First Amendment rights. This theory of the case is inaccurate and obscures the path to resolution of the issues presented.

The petitioner was not convicted of discrediting the Army or participating in a skit which discredited the Army. He was convicted, on the basis of substantial evidence, of the unauthorized wearing of distinctive parts of the Army uniform, by a jury that was properly instructed on all elements of the offense. If Congress, consistently with the First Amendment, may prohibit the unauthorized wearing of the uniform

in the circumstances of this case, and if petitioner was not authorized to wear the uniform, his conviction must be affirmed.

We show in Part II, *infra,* that the government has a legitimate and substantial interest in prohibiting unauthorized persons from wearing the military uniform. The risks of misrepresentation and confusion of the public and of governmental officials which support the general prohibition against unauthorized wearing of the uniform justify the conviction of petitioner, who wore distinctive parts of the Army uniform in a demonstration at an Armed Forces Induction Station, where spectators would be likely to conclude that those who were wearing the uniform were in fact members of the Armed Forces. Petitioner gained no First Amendment immunity from the operation of the statute on the ground that he was engaging in an anti-war demonstration. A civilian has no First Amendment right to wear the uniform of the Armed Forces—to pretend to be what he is not—merely because it is thought to make the communication of ideas more effective.

The statute permitting actors "in a theatrical * * * production" to wear the uniform did not authorize petitioner to wear the Army uniform in the circumstances of this case. As we discuss in Part III, *infra,* the statutory language and legislative history of that exemption, as well as the purposes of the general prohibition against unauthorized wearing of the uniform, establish that the exemption is available only for performances given in a setting where there is a specific area set aside for the actors and in circumstances

where all observers are apprised that the person wearing the military uniform is not in fact a member of the Armed Forces. Petitioner's skit, which was an intermittent event in a street demonstration consisting of picketing and distribution of leaflets, was beyond the scope of the exemption for "theatrical * * * productions" as a matter of law. Since petitioner therefore was not entitled to any instruction concerning this exemption, he was not prejudiced by any error which may have been committed in instructing the jury that he could be acquitted under the exemption if his performance did not tend to discredit the Army. To the extent that that qualification is invalid, its only effect was to limit a defense to which petitioner was not entitled, see Part IV, *infra*.

I. QUESTION CONCERNING JURISDICTION

The extreme untimeliness of the petition for a writ of certiorari in this case presents a substantial question as to this Court's jurisdiction to review the judgment of the court of appeals. Although the petition was accompanied by a motion for leave to file out of time, which the Court granted (A. 72), we believe it is proper to raise and discuss this jurisdictional issue, which was not fully treated at the petition stage of the case. The disposition of untimely petitions for writs of certiorari in criminal cases is a recurrent problem, on which the Court's pronouncements are in conflict. This case presents an appropriate occasion for the Court to focus on this question and to reexamine some determinations which may

have been made without awareness of decisions which should have been controlling.

Rule 22(2) of the Rules of this Court provides that a petition for a writ of certiorari to review the judgment of a federal court of appeals in a criminal case shall be deemed in time when the petition and record are filed within 30 days after the entry of the judgment. The petition in this case was filed 131 days after the judgment of the court of appeals; no extension of time for filing a petition was requested or obtained. The petition was, therefore, 101 days out of time. Even if the maximum extension of time authorized by Rule 22(2)—30 days—had been granted by a Justice of this Court "for good cause shown", the petition would have been 71 days late. Indeed, the petition was 41 days out of time measured by the longest period allowed by statute or rule—90 days—for petitioning for a writ of certiorari or taking an appeal, without extension, in any case. 28 U.S.C. 2101(a)–(d), Rule 22(1). For reasons which follow, we submit that, because of its substantial untimeliness, the petition did not confer jurisdiction on the Court.

Untimeliness as a jurisdictional bar to review by this Court.

It is a well-established principle that statutes prescribing the *classes* of cases which may be reviewed by this Court are to be strictly construed to prevent the enlargement of the Court's appellate jurisdiction beyond the scope which Congress has authorized. See, *e.g., Phillips* v. *United States*, 312 U.S. 246; *Goldstein* v. *Cox*, No. 66, this Term, decided January 26, 1970. Thus, where a direct appeal is taken to this Court

from the decision of a three-judge district court pursuant to 28 U.S.C. 1253, the statutory condition that the case must be one that is "required" by statute to be heard by a three-judge court is a limitation on this Court's jurisdiction, which cannot be disregarded merely because the case was in fact heard by three judges. See *Flast* v. *Cohen,* 392 U.S. 83, 88–91.

Although the time limit within which review by this Court must be sought has not, to our knowledge, been specified in the very provisions which delimit the classes of cases that are reviewable, the Court has consistently held that where Congress has specified such limits by statute, an application made after the time limit has expired does not confer jurisdiction on the Court. See, *e.g., Department of Banking* v. *Pink,* 317 U.S. 264; *Citizens Bank* v. *Opperman,* 249 U.S. 448. These holdings demonstrate respect not only for the constitutional command that this Court shall exercise appellate jurisdiction "under such Regulations as the Congress shall make" (Art. III, Sec. 2; cf. *Ex parte McCardle,* 7 Wall. 506); but also for the important policies which demand strict adherence to time limitations on appellate review. This was made explicit in *Matton Steamboat Co.* v. *Murphy,* 319 U.S. 412, 415, where the Court stated, in holding that it was "without jurisdiction" to entertain an untimely appeal, "[t]he purpose of statutes limiting the period for appeal is to set a definite point of time when litigation shall be at an end, unless within that time the prescribed application has been made; and if it has not, to advise prospective appellees that they are freed of the appellant's demands. Any other construction of the statute would

defeat its purpose." Similarly, in *Federal Trade Commission* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, where the Court dismissed the writ of certiorari on the ground that the petition had been filed out of time, the Court said, "the principle that litigation must at some definite point be brought to an end * * * is * * * reflected in the statutes *which limit our appellate jurisdiction* to those cases where review is sought within a prescribed period" (*id.* at 213; emphasis added).[5]

Where the Congress has delegated to the courts the authority to specify by rule the time within which appellate review must be sought, the rule which the court prescribes is a piece of delegated legislation; it is of no less fundamental character as a regulation on the exercise of appellate jurisdiction than a statutory provision. The fact that the time limitation is fixed by judicial rule rather than statute does not empower the courts to disregard the rule to reach a desired result in individual cases. Thus, the Court held in *United States* v. *Robinson*, 361 U.S. 220, that under the Federal Rules of Criminal Procedure which provided for a 10-day period, without enlargement, for the filing of a notice of appeal to the court of appeals, the district court was not permitted to accept an untimely filing on the ground of "excusable neglect" and that such a filing did not confer jurisdiction on the court of appeals. There the Court said (361 U.S. at 229):

> That powerful policy arguments may be made both for and against greater flexibility

[5] It is noteworthy that the decisions in *Matton Steamboat Co.*, and *Minneapolis Honeywell* were rendered after briefing and argument, requested by the Court, on the timeliness question.

> with respect to the time for the taking of an appeal is indeed evident. But that policy question, involving, as it does, many weighty and conflicting considerations, must be resolved through the rule-making process and not by judicial decision.

See, also, *Berman* v. *United States,* 378 U.S. 530, reaffirming the holding of *Robinson.*

No different result is suggested by the fact that the time within which a petition for certiorari must be filed in criminal cases is specified by the Rules of this Court and not included in the system-wide Rules of Criminal Procedure. Fidelity to the time limits prescribed in the Court's own Rule is no less important to the litigants, and no less significant to effectuation of the policy of finality of litigation, than adherence to the limits specified by statute or the Rules of Criminal Procedure. Constitutional considerations are also present, for it is fair to characterize the time limits prescribed by this Court pursuant to congressional authorization as specifying the period, congenial to the Court's institutional considerations, which Congress intended to be the jurisdictional limitation on the Court's power to review criminal judgments by certiorari. In the absence of any evidence to the contrary, it is a reasonable premise that Congress, in authorizing the Court to fix time limits, contemplated that such limits would be observed as jurisdictional and would not be subject to discretionary waiver by the Court which was not permissible with respect to limits fixed by statute. Indeed, this is just what the Court held in *United States ex rel. Coy* v. *United*

States, 316 U.S. 342, which we discuss in the following section.

While it is true that the Court has indicated that some time limitations are not jurisdictional, we do not believe that our submission here is foreclosed. Nothing in the Court's decision in *United Public Workers* v. *Mitchell*, 330 U.S. 75, 84–86, is contrary to our position. There the Court held that the 60 day period for docketing an appeal "under such rules as may be prescribed by the proper courts", under the predecessor of 28 U.S.C. 2101(a), was not a jurisdictional limitation, and that an appeal which had been timely filed was not subject to automatic dismissal because the record was docketed late, where the appellee had failed to move to dismiss the appeal, as required by the Court's rule, prior to docketing. Since the case involved an appeal which had been timely filed, the policy of finality of litigation and fairness to the parties was fully served because the Court's jurisdiction was seasonably invoked, and the appellee had an adequate remedy under the rule to prevent prejudicial delay in bringing the case to adjudication. We also recognize that, in recent years, the Court has occasionally granted certiorari and ruled on the merits in criminal cases in which the petition was filed out of time. See Stern & Gressman, *Supreme Court Practice*, 242–245 (4th ed. 1969). In many instances this has been done without express recognition of the timeliness question in the Court's opinion, and in the cases where the Court has noticed the untimeliness of the petition and dismissed the defect as "not jurisdictional" it has not had the ad-

vantage of a full submission by the parties. Thus, in *Heflin* v. *United States*, 358 U.S. 415, which is frequently cited as the authority for the proposition that Rule 22(2) is not jurisdictional, the government did not argue that the untimeliness of the petition deprived the Court of jurisdiction, and the Court disposed of the issue in the following language, relegated to a footnote, without any citation to precedent (*id.* at 418 n. 7):

> * * * Nevertheless, because successive motions may be made under Rule 35 [F.R.Crim.P.] and because no jurisdictional statute is involved, the majority agrees to dispense with the requirements of our Rule [22(2)] in order to avoid wasteful circuity.[6] * * *

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[6] The petitioner in *Heflin* sought to challenge, in a postconviction proceeding, the legality of a sentence which he had not begun to serve. The government argued, and a majority of the Court held, that petitioner's claim was not cognizable under 28 U.S.C. 2255. The government acknowledged, however, that petitioner could raise the claim under Rule 35, F.R.Crim.P. After noting that if the case should be treated as arising under Rule 35, the petition was "out of time under Rule 22(2)", the government's brief went on to state: "We recognize, however, that if petitioner should properly prevail under Rule 35, the same issue could be raised by a new motion under that rule, and to that extent the question is not academic at this time" (Brief for the United States, No. 137, O.T. 1958, p. 12). The brief then discussed the merits of petitioner's claim, which a majority of the Court reached under the Rule 35 theory, and which the Court unanimously resolved in petitioner's favor. The government's comment on the timeliness question, which was phrased in terms of the Court's *discretion*, sheds light on the Court's statement quoted in the text and shows that the government's submission did not put in issue the problem of the Court's *jurisdiction* which has become evident on further research. See also *Taglianetti* v. *United States*, No. 446, O.T. 1968, in which the government's brief in opposition stated (p. 3)

The origin of the 30-day rule for petitioning for certiorari in federal criminal cases.

The statutory authority for Rule 22(2) is found in the acts of February 24, 1933, 47 Stat. 904, and March 8, 1934, 48 Stat. 399—now 18 U.S.C. 3772—which authorize the Supreme Court to prescribe rules of practice and procedure with respect to proceedings after verdict in criminal cases, including "rules prescribing the times for and manner of taking appeals and applying for writs of certiorari * * *". In the initial rules promulgated under this authority, effective September 1, 1934, a 30-day period was specified for the filing of petitions for writs of certiorari. 292 U.S. 660, 665–666.

At the time these statutes were enacted, a provision of the Judiciary Act of February 13, 1925, specified a general limitations period for all cases in the Supreme Court on appeal or certiorari. It provided that "No appeal, or writ of certiorari, intended to bring any judgment or decree before the Supreme Court for review shall be allowed or entertained unless application therefor be duly made within three months after the entry of such judgment or decree * * *" (43

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that the petition was 11 days "out of time under this Court's Rule 22(2) and for that reason should be denied", and went on to discuss the merits of the petitioner's contentions. The Court granted the petition and affirmed the judgment in a *per curiam* opinion dealing with a question of electronic surveillance; the Court dealt with the timeliness question in the following footnote (394 U.S. 316 n. 1):

> Although this petition for certiorari was not filed within the 30 days allowed by the Court's Rule 22(2), the time limitation is not jurisdictional, *Heflin* v. *United States*, 358 U.S. 415, 418, n. 7 (1959), and does not bar our exercise of discretion to consider this case.

Stat. 940, 28 U.S.C. (1940 ed.) 350). The purpose of the legislation authorizing the Court to promulgate rules for criminal cases, including the time for petitioning for certiorari, was specifically to "expedite" the handling of criminal appeals. H. Rep. No. 2047, 72d Cong., 2d Sess., p. 2; S. Rep. No. 257, 73d Cong., 2d Sess.; H. Rep. No. 858, 73d Cong., 2d Sess.; *United States* v. *Robinson, supra,* 361 U.S. at 226. And the 30-day time limitation on petitions for certiorari was adopted to further this goal. *United States ex rel. Coy* v. *United States, supra,* 316 U.S. at 345.

In the first case to reach the Court on the question of the effect of the 30-day rule, *United States ex rel. Coy* v. *United States,* in which the issue was fully litigated, the Court rejected the petitioner's claim that the petition, which was filed more than 30 days after the judgment of the court of appeals, was in time under the general 3-month time limitation statute. The Court unanimously held that, in light of the purpose of expediting criminal proceedings, the Criminal Rules applied to all criminal proceedings in the Supreme Court, notwithstanding the Rules' inadvertent failure to cover that particular case in the court of appeals, and that where a petition is "filed too late [under the Rules] we are without jurisdiction" (316 U.S. at 344). The Court subsequently cited the *Coy* decision in orders denying certiorari in criminal cases on the ground that the petition was untimely. *E.g., Roscoe* v. *United States,* 325 U.S. 890; *Buie* v. *United States,* 317 U.S. 689.

Apart from the specific authority of the *Coy* decision, which is most likely to reflect the contempo-

raneous understanding of the jurisdictional effect of the 30-day rule, the origin of the rule itself suggests a persuasive reason for concluding that the petition in the present case is beyond the Court's jurisdiction. In authorizing the Court to specify the time limit for certiorari petitions by rule, Congress intended to empower the Court to expedite the disposition of criminal cases, which theretofore were covered by the general 3-month limitation. Even if it is assumed that the legislation did not require the Court to treat any shorter period adopted by rule as a strict jurisdictional bar, it is unmistakably clear that Congress did not intend to authorize the Court to allow a longer period in criminal cases than in all other cases. Thus, if for some reason the Court had specified in its rule the same three month period provided in the general statute, it would stand the enabling legislation on its head to argue that the Court could waive its rule and grant untimely petitions in criminal cases merely because the time limit was set by rule and not by statute. Yet that would be precisely the result of the Court's entertaining the petition here, which was filed more than 40 days after the longest period allowed by Congress for petitioning in any case.[7]

The policy of finality of litigation in criminal cases.

In addition to the constitutional and statutory considerations developed above, the importance of finality of litigation in the administration of criminal justice lends further support to the principle that the time limitation specified by rule in criminal cases

[7] Although the Judicial Code, as revised in 1948, presently contains no 90-day provision generally applicable to all cases on certiorari, we find nothing to indicate that the revision was intended to allow a longer period in criminal cases. On the contrary, the Revisers Note following 28 U.S.C. 2101 states that the words "in

should be treated as jurisdictional. The sense of certainty which results from a final criminal judgment is critical to the accomplishment of the purposes of enforcement of the criminal law. It assures the general public and potential offenders that the system can impose its prescribed sanctions speedily and fairly, and it signifies to the convicted defendant himself that he must submit to the correctional and rehabilitational process which society has devised for the avoidance of future offenses. In the absence of time limitations on the exercise of appellate remedies, and without a willingness by the courts to observe those limitations, this certainty cannot be achieved.

It is true that our system of justice affords a generous collateral remedy for the correction of fundamental errors after direct appellate review has been exhausted, so that a sentence of imprisonment is never conclusively "final" against challenge on constitutional grounds. But the availability of this remedy, by assuring that constitutional defects will not go uncorrected, argues for, not against, the principle that time limitations on direct review should be enforced. *Robinson* v. *United States, supra,* 361 U.S. at 230 n. 14. It is important both to the preservation of the symbolic effect of criminal judgments and to the administration of already overburdened prosecutorial agencies that there be a definite point in time after

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a civil action * * *" were added to Section 2101(c), the present statement of the 90-day rule, "because section 350 of title 28 U.S.C., 1940 ed. [the general 3-month limitation period] was superseded as to criminal cases by Federal Rules of Criminal Procedure, rule 39 [sic] (a)(2), (b)(2)." This comment undoubtedly refers to Rule 37, which, in subsection (b)(2), specified a 30-day limitation period for petitions for certiorari, as did its predecessor, Rule XI of the 1934 Rules in Criminal Cases. See 327 U.S. 821, 825, 857–858, 859–860; 292 U.S. 661, 665–666.

which a conviction cannot be challenged for errors which are not of a fundamental character. And to the extent that this Court's rules for the retroactive effect of new constitutional decisions turn upon whether a conviction has become 'final", strict observance of the time limitations for invoking direct appellate review is necessary to ensure that such rules operate fairly with respect to all defendants similarly situated.

It may be objected that strict enforcement of time limitations produces unfairness where delay is caused by ignorance of rights or some other compelling circumstances. Cf. *Teague* v. *Regional Commissioners of Customs*, 394 U.S. 977 (Black, J., dissenting from the denial of certiorari). But such "unfairness", which is always a subjective determination, is inherent in any rule which prescribes the time within which an act must be done. Where the rule involves a fundamental step in the administration of justice—such as a statute of limitations or the time for invoking an appellate court's jurisdiction—the potential for unfairness does not outweigh the evil which would result from a policy of disregarding the rule to exercise jurisdiction long after the time has expired. The problem illustrated by the present case—in which the petition was filed after the expiration of any possible limitation period which could have been borrowed to fix an outer limit on the exercise of discretion to allow untimely filings for "excusable neglect"—is that there is no rule of law to prevent the Court from entertaining an untimely petition even years after the entry of judgment below. As the Court

said in *Robinson* v. *United States, supra,* 360 U.S. at 230:

> * * * If, by that process, the courts are ever given power to extend the time for the filing of a notice of appeal upon a finding of excusable neglect, it seems reasonable to think that some definite limitation upon the time within which they might do so would be prescribed; for otherwise, as under the decision of the court below, many appeals might—almost surely would—be indefinitely delayed. Certainly that possibility would unnecessarily produce intolerable uncertainty and confusion. * * *

The Court responded to this problem in Rule 4(b) of the Rules of Appellate Procedure, which provides that "[u]pon a showing of excusable neglect, the district court may, before or after the time has expired, * * * extend the time for filing a notice of appeal [to the court of appeals] for a period *not to exceed 30 days from the expiration of the* [10-day period] *otherwise provided* * * * (emphasis added). In the absence of such a provision in the rule governing the time for petitioning for certiorari, however, we believe that the rule should not be treated as subject to discretionary waiver, without limitation, and, accordingly, that the untimeliness of the petition is a jurisdictional bar to this Court's review.

II. PETITIONER'S FIRST AMENDMENT RIGHTS WERE NOT VIOLATED BY HIS CONVICTION FOR THE UNAUTHORIZED WEARING OF DISTINCTIVE PARTS OF THE MILITARY UNIFORM

The essence of petitioner's First Amendment contention, as we understand it, is that he was convicted for engaging in conduct to which the prohibition

against unauthorized wearing of the military uniform could not constitutionally be applied. This is in effect the conclusion which he draws from his assertion that there is no sufficient governmental interest underlying 18 U.S.C. 702, as well as the premise for his challenge to the limitation on the exemption contained in 10 U.S.C. 772(f). To the extent that he argues that he was not afforded a constitutionally adequate defense under 10 U.S.C. 772(f), the persuasiveness of that argument as a basis for reversal rests on petitioner's largely unstated assumptions as to what defenses were constitutionally required in the circumstances of this case—matters we defer to subsequent sections of the brief.

We begin with petitioner's fundamental position that his wearing of distinctive parts of the military uniform in the circumstances of this case was protected by the First Amendment against the operation of 18 U.S.C. 702. Petitioner's primary submission rests upon two contentions: (1) that there is no sufficient governmental interest underlying 18 U.S.C. 702 to justify its application to persons who choose to wear distinctive parts of the military uniform while exercising First Amendment rights of speech and assembly; and (2) that even if there is some such governmental interest, it does not justify the conviction of petitioner since he was acting in a "play". Neither contention, in our view, can be sustained.

A. THE PROHIBITION AGAINST UNAUTHORIZED WEARING OF THE UNIFORM IS SUPPORTED BY SUBSTANTIAL GOVERNMENTAL INTERESTS UNRELATED TO THE REGULATION OF SPEECH

The authority of Congress to regulate the wearing of the military uniform rests upon its broad constitu-

tional power to raise and support armies and to make all laws necessary and proper to that end. *United States* v. *O'Brien*, 391 U.S. 367, 377. A military uniform, like a police uniform, is necessary for the function that the military performs. To other military personnel, the uniform identifies the wearer's branch of service, rank, and specialty, and indicates both his scope of authority over subordinates and the extent to which he is subject to the command of a superior officer. To civilians, the uniform announces the wearer's military authority and the fact that he is under military discipline. See *Board of Education* v. *Barnette*, 319 U.S. 624, 632. It signifies the wearer's authority to be present at defense installations, to have possession of government property, including weapons, and to command and keep the peace in times of emergency, such as a local civil disturbance or natural disaster. On occasions when a member of the Armed Forces is on leave from military duties, the uniform may be significant for disciplinary and other purposes, see *O'Callahan* v. *Parker*, 395 U.S. 258; it may make it possible, for example, for the military to control its personnel and thus relieve a burden on civilian authorities. Finally, as a symbol of shared experiences in the service and fidelity to its standards of conduct, the uniform plays an intangible but important role in morale and esprit de corps for the military services.

The significance which both military personnel and civilians regularly attach to the wearing of a military uniform sufficiently demonstrates the govern-

ment's substantial interest in preserving the integrity of the uniform by restricting its use to authorized persons. Civilians undoubtedly believe, at this time, that persons who publicly wear the military uniform or distinctive parts thereof are, in fact, members of the Armed Forces and subject to military discipline. Allowing unauthorized persons to wear the uniform would create a risk that unsuspecting civilians might be defrauded or physically injured as a result of relying on the authority of an impostor's uniform. But the problem extends beyond criminal conduct; there is also a risk of confusion respecting activities which the public might conclude are officially sanctioned by reason of the participation of persons wearing military uniforms without authority to do so, as well as other types of conduct which some persons might find objectionable and seek to hold the military service responsible. Carried to its foreseeable result, the unauthorized wearing of the military uniform or its distinctive parts could cause a reversal of the existing presumption of the authority of a person wearing the uniform and create widespread public distrust.

These considerations justify a much more comprehensive regulation of the wearing of the military uniform than would be constitutionally permissible with respect to other items of dress in which the government has no special interest. Compare *Tinker* v. *Des Moines School District,* 393 U.S. 503. The instant statute is responsive to what Mr. Justice Harlan has called the government's "vital interest * * * in preserving the reputation, morale, and integrity of the military service." *O'Callahan* v. *Parker,* 395 U.S. 258, 281

(dissenting opinion). And, as this Court said with respect to a complementary statute specifically directed against impersonation of government officers and employees, one of the purposes of such a statute is "to maintain the general good repute and dignity of the service itself." *United States* v. *Barnow*, 239 U.S. 74, 80; *United States* v. *Lepowitch*, 318 U.S. 702, 704; *United States* v. *Wight*, 176 F. 2d 376, 379 (C.A. 2). Senator Thomas of Colorado, who introduced the original version of the instant statute as an amendment to the National Defense Act of 1916, stated that his amendment[8] was "designed to protect the dignity of the American uniform and to punish discrimination against it." 53 Cong. Rec. 6347; see *id.* at 8404.

Since the prohibition against the wearing of the uniform by unauthorized persons effectuates legitimate governmental interests, petitioner, a civilian, gained no right to wear that uniform on the street because he did so for the purpose of protesting the war in Vietnam. It is no necessary incident of the freedom of speech that a civilian demonstrator have the right to impersonate a soldier by wearing distinctive parts of the military uniform. Any doubt on this score should have been laid to rest by *United States* v. *O'Brien*, 391 U.S. 367, in which this Court upheld a statute making it a crime to destroy a Selective Serv-

[8] The amendment introduced by Senator Thomas initially included a provision, not included in the final version, making it an offense for a common carrier or a hotel or theater to discriminate against a military officer or enlisted man. Senator Thomas noted that a statute forbidding such discrimination (now 18 U.S.C. 244) was limited to the District of Columbia, Alaska and territories.

ice registration certificate. As the Court said (391 U.S. at 376):

> * * * However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms; compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. * * *

Under this test, the substantial governmental interest which we have detailed above justifies whatever incidental limitations on the communication of ideas may result from the prohibition which Congress has enacted. In sum, the restriction on the use of the uniform, like the protection of the Selective Service certificate "furthers the smooth and proper functioning

of the system that Congress has established to raise armies" *United States* v. *O'Brien*, 391 U.S. at 381.

B. THESE GOVERNMENTAL INTERESTS SUPPORT PETITIONER'S CONVICTION UNDER 18 U.S.C. 702 ON THE FACTS OF THIS CASE

The fact that Congress exempted "actor[s] in a theatrical or motion-picture production" (10 U.S.C. 772(f)) from the prohibition against unauthorized wearing of the uniform does not, as petitioner argues, demonstrate a "recognition that the governmental interest * * * is not substantial or compelling * * *" (Br. 6). Nor does it suggest that the governmental interests underlying 18 U.S.C. 702 are attenuated in the circumstances of this case. On the contrary, this limited exemption—which we consider, on the issue of statutory construction, in the following section—is fully consistent with the significant governmental interests described above.

The circumstances which, in our view, are contemplated by that exemption include, at the least, a performance which is given in a manner and setting which is calculated to give notice to all spectators that they are witnessing something that is "staged" rather than real. Such circumstances, by definition, negate the risks of misrepresentation and confusion of the public and of governmental officials which the prohibition against unauthorized wearing of the uniform was designed to prevent. We need not consider whether the statutory exemption for such performances is constitutionally required, or the extent to which such performances would be constitutionally protected in the absence of the exemption, because

the circumstances in which petitioner wore distinctive parts of the military uniform were not calculated to give notice to spectators that he was not in fact a member of the Armed Forces. Indeed, the location which petitioner and his colleagues chose for their demonstration—an Armed Forces induction station—is a setting which strongly suggested to spectators that those who were wearing distinctive parts of the Army uniform were members of the Armed Forces.

Nor is there merit in any suggestion that petitioner's conduct may have been constitutionally immune from punishment, irrespective of the scope of the statutory exemption, because he was performing in a "play" protected by the First Amendment. This case does not call for resolution of broad questions of the scope of the First Amendment protection for theatre productions, or whether, and the extent to which, the First Amendment limits governmental regulation when actors take to the streets to present their play-message to a largely unconsenting public. The only question here is the regulation of *conduct,* the wearing of distinctive parts of the military uniform, under a statute which reaches only that conduct and does not censor the content of individual speech or control the places where it may be given. The objectives of the statute, as Judge Goldberg said in his concurring opinion below, "require that the patriot no less than the revolutionary, the bystander no less than the protester, forego the unauthorized wearing of the uniform" (A. 70). There are many other activities, including more direct exercises of the freedom of speech than petitioner's performance, in which the wearing of a military uniform may

be thought to make the communication of ideas more effective. Yet it hardly can be contended that a civilian intending a speech about military misconduct, or the need for greater military expenditures, for example, is entitled, under the First Amendment, to wear the uniform in delivering the speech notwithstanding the prohibition in 18 U.S.C. 702. Similarly, petitioner's performance—which, like the foregoing example, may have gained in effectiveness by a misrepresentation of military status and which was carried out in a place where that misrepresentation was very likely to be successful—was not "protected" by the First Amendment against the operation of this general federal statute.

III. PETITIONER DOES NOT COME WITHIN THE EXEMPTION CONTAINED IN 10 U.S.C. 772(f) FOR THE WEARING OF A MILITARY UNIFORM BY AN ACTOR IN A THEATRICAL PRODUCTION

Under 10 U.S.C. 772(f) a civilian "actor in a theatrical or motion picture production" is authorized to wear the military uniform "[w]hile portraying a member of the Army, Navy, Air Force, or Marine Corps" and is thus exempt from the prohibition of 18 U.S.C. 702 to which he would otherwise be subject. Although petitioner devotes a major portion of his argument to establishing the unconstitutionality of a subsequent limitation on that exemption—"if the portrayal does not tend to discredit that armed force" (see Part IV, *infra*)—nowhere in his brief does he consider the threshold question whether he comes within the exemption in any event as an "actor in a

theatrical production." We view this question as the heart of the case. If the prohibition of 18 U.S.C. 702 may constitutionally be applied to petitioner's wearing of distinctive parts of the Army uniform, as we argue in Part II, *supra,* he must establish, in order to secure reversal of his conviction, that he was at least entitled to a jury instruction encompassing the exemption in 10 U.S.C. 772(f). If he was not entitled to such an instruction, then, as we argue in Part IV, *infra,* any error which the court may have made in submitting the exemption to the jury together with the challenged limitation affords no basis for reversal. We conclude, for the following reasons, that petitioner's conduct did not come within the statutory exemption, as a matter of law, and therefore that he was not entitled to an instruction submitting that defense to the jury.

A. THE STATUTORY EXEMPTION IS LIMITED TO PERFORMANCES BY ACTORS IN PLAYHOUSES, THEATERS, AND OTHER SETTINGS IN WHICH THE ROLE OF THE PERFORMERS AS ACTORS IS CLEARLY APPARENT FROM THE CIRCUMSTANCES

1. The language, history, and purpose of the exemption for "an actor in a theatrical production" show that the exemption is applicable only to performances in playhouses, theaters, or equivalent settings, where there can be no likelihood of misunderstanding by any spectator that the person wearing the uniform is not in fact a soldier. It was not intended, to paraphrase Shakespeare, to make a stage of the world and an actor of anyone who chooses to wear a military uniform.

The source of both the prohibition found in 18 U.S.C. 702 and the exemption found in 10 U.S.C. 772(f) is Section 125 of the National Defense Act of June 3, 1916 (39 Stat. 166, 216–217), which read in pertinent part:

> It shall be unlawful for any person not an officer or enlisted man of the United States Army, Navy, or Marine Corps, to wear the duly prescribed uniform of the United States Army, Navy, or Marine Corps, or any distinctive part of such uniform, or a uniform any part of which is similar to a distinctive part of the duly prescribed uniform of the United States Army, Navy or Marine Corps: *Provided,* That the foregoing provision shall not be construed * * * to prevent any person from wearing the uniform of the United States Army, Navy, or Marine Corps in any playhouse or theater or in moving-picture films while actually engaged in representing therein a military or naval character not tending to bring discredit or reproach upon the United States Army, Navy, or Marine Corps * * *.[9]

This original exemption was thus limited by its terms to the wearing of a military uniform "in any playhouse or theater or in moving-picture films." Consistently with the policies noted above, the exemption was applicable only to performances in places

[9] Other exemptions enacted at that time and carried forward in 10 U.S.C. 772, permit the uniform to be worn, *inter alia*, by former officers upon occasions of ceremony; by discharged servicemen for a limited period following discharge; and by civilians taking a course of military instruction given by military authorities. See also Army Regulation No. 670–5, Chap. 3 (September 23, 1966).

where the audience would be unequivocally aware that the individuals portraying military figures were merely actors in the world of make-believe.

In 1956, Titles 10 and 32 of the United States Code underwent a complete revision for the purpose of combining the laws affecting the Armed Forces, eliminating duplicate and obsolete provisions, and clarifying statutory language.[10] At that time the phrase "actor in a theatrical or motion-picture production" was substituted for the phrase "in any playhouse or theater or in moving-picture films while actually engaged in representing therein a military * * * character," and the exemption was codified in 10 U.S.C. 772(f). The sponsors emphasized, however, that no substantive change had been intended by the revision.[11] The sole purpose of the restatement was to remove the negative character of the authorization and thus "to make positive the authority of the persons described * * * to wear the uniform prescribed for the appropriate organization or activity." H. Rep. 970, 84th Cong., 1st Sess., pp. 52–53; S. Rep. 2484, 84th Cong., 2d Sess., pp. 63, 64.

The 1956 revision, eliminating "in any playhouse" and substituting "theatrical or motion-picture produc-

[10] In the 1948 revision of the Criminal Code, the penalty provision (now 18 U.S.C. 702) was placed in Title 18. Prior to 1956, the remainder of the provision, then entitled "Protection of the uniform," was codified in 10 U.S.C. (1952 ed.) 1393.

[11] See the testimony of Dr. F. Reed Dickerson, Office of the General Counsel of the Department of Defense, Hearings before a Subcommittee of the Senate Committee on the Judiciary on H.R. 7049, 84th Cong., 2d Sess., pp. 15–16; Statements of Senators O'Mahoney and Wiley, 102 Cong. Rec. 13944, 13953 (July 23, 1956); and H. Rep. No. 970, 84th Cong., 1st Sess., p. 8.

tion," is not without significance. The change in language settled that a formal playhouse is not a prerequisite for the lawful wearing of the uniform by civilian actors, and it clarified the status of television performances, which placed strain on the language "in any playhouse." But we can find no basis for concluding that the new term "theatrical * * * production" should be interpreted as a departure from the intent of Congress, manifest in the original language, to confine the exemption to situations where the make-believe role of the person wearing the uniform is clear from the setting. The language itself suggests no such departure. A "theatrical * * * production" plainly requires more than mere "theatrics". Fairly read in light of the provision's history, it connotes the giving of performances in a setting equivalent to a playhouse or theater where even a casual observer would be aware that he was witnessing a make-believe performance and that the person in uniform was an actor and not a serviceman presently on active duty with the armed forces. This does not mean that the performance must be given in a building regularly devoted to the presentation of entertainment, or even that it must be given in a building at all. It means only that the performance, wherever given, must preserve some of the traditional characteristics of dramatic presentations, such as a defined area set aside for the actors and an audience apprised that the events which they observe are portrayed, not real. We need not delimit these characteristics with more precision to resolve this case. In modifying the language of the exemption, Congress obviously did not

intend to grant to any person the right to wear a military uniform in any place whenever he chooses, as did the petitioner here, to "play" a soldier. Such a grant would have frustrated the basic purpose of protecting the "good repute and dignity" of the uniform by allowing any civilian to wear the military uniform or its distinctive parts for any purpose that the wearer claimed to be "theatrical".

2. Under the construction of the statute that we have urged, petitioner's conduct plainly did not qualify, as a matter of law, for the statutory exemption for theatrical productions. The skit was an intermittent event in a demonstration in the street in front of an induction station that also included picketing and distributing leaflets. In no sense could the skit be described as a "theatrical * * * production" as that phrase is used in the statute. There was neither a defined area for the actors equivalent to a stage or a defined area for an audience apprised that petitioner was merely a civilian demonstrator dressed as a soldier and not a member of the army. Pedestrians and motorists who either stopped or passed by the demonstration could reasonably believe that petitioner was in fact a soldier, as his wearing of distinctive parts of the uniform was intended to convey.

As discussed above, a civilian has no First Amendment right to wear the uniform to picket or carry a sign merely because his right to picket might be protected from other types of regulation. Hi-jinx in the streets, in a place not cordoned off to make the area the substantial equivalent of a theater, in order to get the attention of passers-by is conduct which has all

the elements of picketing and no real similarity to the "theatrical production" which Congress contemplated. Petitioner's argument that his routine was a "play" and that a "play" must be comprised within the term "theatrical * * * production" is a perfect illustration of the illogic of which Mr. Justice Holmes warned in *Guy* v. *Donald*, 203 U.S. 399, 406: "As long as the matter to be considered is debated in artificial terms there is danger of being led by a technical definition to apply a certain name, and then to deduce consequences which have no relation to the grounds on which the name was applied."

IV. SINCE PETITIONER'S CONDUCT DOES NOT QUALIFY, AS A MATTER OF LAW, FOR THE EXEMPTION FOR ACTORS IN A THEATRICAL PRODUCTION, IT WAS AT MOST HARMLESS ERROR TO CHARGE THE JURY THAT PETITIONER COULD BE ACQUITTED UNDER THE EXEMPTION, BUT ONLY IF HIS PERFORMANCE DID NOT TEND TO DISCREDIT THE ARMY

The final question in this case is presented by petitioner's contention that the limiting language in 10 U.S.C. 772(f), making the exemption for theatrical productions applicable only "if the portrayal does not tend to discredit [the] armed force", is violative of the First Amendment. Petitioner is correct in asserting that this limitation does constitute an indirect regulation of the content of the production, and this raises an issue as to whether the condition is constitutional. In support of the statutory limitation it may be argued that such a qualification on the exemption is justified by some of the legitimate govern-

mental concerns for preserving dignity and respect for the uniform which underlie the general prohibition against unauthorized wearing of the uniform. And it should be pointed out that in this case, unlike the cases on which petitioner relies (*e.g., Shuttlesworth* v. *Birmingham,* 394 U.S. 147), the challenged provision is not part of the prohibitory language of the statute but appears in a separate—and severable—exemption which petitioner seeks to employ notwithstanding his deliberate disregard of the limitation. Unless the exemption for theatrical productions is constitutionally necessary, it could be argued that this limitation—which ordinarily would have a minimal, and avoidable, impact on the content of the drama—is a reasonable condition on an exemption which the individual must accept according to its terms. Against those arguments, however, petitioner may invoke the principle established by decisions of this Court that the government may not condition or withhold the granting even of gratuitous benefits on grounds which inhibit the exercise of First Amendment rights. See, *e.g., Speiser* v. *Randall,* 357 U.S. 513, 518–519; *Sherbert* v. *Verner,* 374 U.S. 398, 404–405; *Shapiro* v. *Thompson,* 394 U.S. 618, 627; Note, 73 Harv. L. Rev. 1595, 1600–1602 (1960).

In light of the position developed in the preceding sections, however, we believe that the Court need not reach the question of the validity of the limitation in 10 U.S.C. 772(f). Although the trial court, in giving an instruction based on that statute, charged the jury that petitioner must be acquitted if it found that he

wore parts of an Army uniform in a theatrical production if his performance did not tend to discredit the Army, any error in thus limiting the exemption does not call for reversal. As we have shown above petitioner had no right to an instruction based upon 10 U.S.C. 772(f) because, as a matter of law, the jury could not find that he was an actor in a theatrical production. He received the instruction giving him this defense only after the trial judge had expressed doubt whether there was any occasion for such an instruction.[12] Petitioner thus received the benefit of a defense to which he was not entitled. In other circumstances, where a trial court has given a defendant an improper advantage in its instructions, including an extra defense, the courts have concluded that any error in such instructions is not prejudicial. See, *e.g., Sylvia* v. *United States,* 312 F. 2d 145 (C.A. 1), certiorari denied, 374 U.S. 809; See also *Killian* v. *United States,* 368 U.S. 231, 257–258; *Lopez* v. *United States,* 373 U.S. 427, 435–436; *Ebeling* v. *United States,* 248 F. 2d 429, 438 (C.A. 8), certiorari denied *sub nom. Emerling* v. *United States,* 355 U.S. 907.

[12] The judge said that he thought there was a difference between a theatrical performance and a theatrical production (R. 209).

CONCLUSION

For the reasons set forth in Part I, *supra,* the writ of certiorari should be dismissed for lack of jurisdiction. If the Court concludes that it does have jurisdiction, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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